No. 79-375

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL GARY WHITMIRE AND DONALD JOHN WILLIAMS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 595 F.2d 1303.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1979. A petition for rehearing was denied on August 6, 1979. The petition for a writ of certiorari was filed on September 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Magistrates Act, which allows a district court to decide a suppression motion based on

the record developed before the magistrate and the magistrate's proposed findings of fact and recommendations, violates the Due Process Clause.

2. Whether the customs officers' search of petitioner Whitmire's boat violated the Fourth Amendment.

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Florida, petitioners were convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Whitmire was also convicted of importation of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1). Petitioner Whitmire was sentenced to concurrent three-year terms of imprisonment to be followed by a special parole term of two years. Petitioner Williams was sentenced to a two-year term of imprisonment to be followed by a special parole term of two years.

The essentially undisputed evidence at trial showed that early on the morning of December 23, 1976, two customs officials on maritime patrol in an intercoastal waterway observed a 25-foot boat travelling at approximately 40-45 miles per hour through an inlet connecting the ocean with the inland waterway. The day was unpleasant for boating—the weather was overcast, cold, and windy and the water choppy. The officers saw two males aboard the vessel but could see no fishing gear. The speeding boat produced a heavy wake and the pounding of the bow threw an inordinately large spray, which indicated to the experienced officers that the boat carried a heavy cargo in the bow section. One of the officials knew that in the past year searches in analogous circumstances (low bow, excessive bow spray) had uncovered marijuana in approximately 25 similar vessels (Pet. App. 8).

Accordingly, the customs agents determined to stop the boat for further investigation. While in pursuit, the officers observed the boat continue at its high rate of speed past a customs inspection station and past two posted "no wake" areas, in flagrant violation of Coast Guard regulations concerning navigation in inland waters. The officers finally caught up to the speedier boat as it was being docked on a canal behind Whitmire's house. They noticed that the boat was heavily encrusted with salt crystals indicating that the vessel had been on an extended ocean voyage. In addition, both petitioners were wearing new identical orange sweatshirts with "BIMINI" emblazoned on the chest (Pet. App. 8).

Petitioners had disembarked and were walking away from the dock when the agents addressed them, asking to see identification and registration papers. Petitioner Whitmire produced identification and an unsigned boat registration made out to the Excellent Car Company. Petitioner Williams had no identification. Concerned that the boat was stolen as well as carrying contraband, one officer stepped down into the cockpit of the motorboat. He immediately smelled the strong odor of marijuana emanating from the forward compartment of the boat, and, upon opening this compartment, he discovered approximately 1,500 pounds of baled marijuana. The officers then arrested petitioners. A search incident to the arrest revealed an American Express receipt in Whitmire's wallet covering the purchase of a large amount of fuel in Bimini the previous day (*id.* at 9).

DISCUSSION

1. Petitioners contend (Pet. 11, 16-17) that the reference of their suppression motion to a magistrate violated the Due Process Clause of the Fifth Amendment. Pursuant to the Federal Magistrates Act, 28 U.S.C.

636(b)(1)(B), the district court referred petitioners' pretrial suppression motions to a federal magistrate. Petitioners objected to this procedure. Following an evidentiary hearing on the suppression motion, the magistrate made proposed findings of fact and recommended that petitioners' motions be denied. Petitioners filed their objections to the magistrate's recommendation and report and renewed their objection to the reference procedure itself. The district court declined to hold another suppression hearing. Rather, after reviewing the proceedings before the magistrate, the magistrate's report and recommendation, and petitioners' written submissions, the court made a "de novo determination" of the suppression issue, in accordance with Section 636(b)(1), and denied the motion to suppress. The court of appeals, squarely rejecting a contrary holding of the Seventh Circuit in *United States* v. *Raddatz*, 592 F.2d 976 (1979), concluded that the reference to a magistrate did not deprive petitioners of due process of law (Pet. App. 7 n.1).

This Court has recently granted the government's petition for a writ of certiorari in *Raddatz*, cert. granted, No. 79-8 (Oct. 1, 1979), to consider the constitutionality of the Federal Magistrates Act.[1] Here, as in *Raddatz*, the district court assigned a suppression motion to a magistrate and here, as in *Raddatz*, the court adopted the magistrate's findings and recommendations. In both cases, the district court made the mandatory de novo determination of the suppression issue (28 U.S.C. 636(b)(1)), but did not actually rehear the live testimony previously adduced before the magistrate. For the reasons stated in our petition in *Raddatz* (Pet. 11-18), we submit that the

[1]A copy of our petition in *Raddatz* has been sent to petitioners.

reference procedures established by the Act are consistent with the Constitution and that therefore the court of appeals in this case correctly declined to follow *Raddatz*. Nonetheless, because *Raddatz* is now pending before the Court, it may be appropriate to defer disposition of this petition until a decision is rendered in *Raddatz*.[2]

2. Petitioners' further contention (Pet. 9-10, 12-16) regarding the validity of the customs officers' search of petitioner Whitmire's boat does not warrant review by this Court.[3]

The majority below held that "the fourth amendment allows the boarding of a pleasure craft, sighted initially in intercoastal waters, as to which officers have a reasonable suspicion of a customs violation—a boarding that occurred [only] after an unsatisfactory document check on shore" (Pet. App. 31). The majority found it reasonable, in light of the articulable facts giving rise to a founded suspicion of a customs violation, "to detain the [petitioners] pending a further brief inspection aboard, even absent known border crossing facts" (*ibid.*). Furthermore, "as soon as the boat was boarded, probable cause arose, fully justifying the more detailed search"

[2]Although the court of appeals expressly rejected the holding in *Raddatz* (Pet. App. 7 n.1), the cases may be distinguishable. Unlike *Raddatz*, there was no material conflict between petitioner Whitmire's testimony (petitioner Williams did not testify) and that of the government agents at the suppression hearing. Thus, even if the decision of the court of appeals in *Raddatz* is affirmed, it would not necessarily follow that petitioners' contention on the somewhat different facts of this case should be sustained.

[3]At the outset we note that petitioner Williams was not in the boat at the time of the search, and he did not claim a possessory or ownership interest in either the boat or the seized marijuana. It is therefore apparent that no Fourth Amendment rights of his were violated. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

(*ibid.*). Therefore, the majority concluded, "the search was within statutory authority [*i.e.*, 19 U.S.C. 1581(a)] and was constitutional * * *" (Pet. App. 31).

Judge Rubin, concurring, disagreed with portions of the majority's extensive analysis of the constitutional issues but reached essentially the same result:

> [W]hen a vessel is seen only on inland waters, the customs officials may *search* it without probable cause only if they demonstrate reasonable grounds to believe a border crossing has taken place; they may make a limited investigatory *stop* and *boarding* if they can articulate specific facts that, together with logical inferences drawn therefrom, reasonably warrant their suspicion of illegal activity. The search here was not a valid border search, but it was justified as an investigatory stop prompted by reasonable suspicion of law violation under [*United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975)].

Pet. App. 41 (emphasis in original).

Petitioners do not dispute that the observations of the customs officers, and the reasonable inferences drawn therefrom, gave rise to founded suspicion of criminal activity. Rather, they contend (Pet. 15-16) that such suspicion is insufficient to conduct an investigatory stop and boarding because customs officers must also have a reasonable suspicion that the vessel crossed the border. This contention is without merit.

At the outset, it is beyond dispute that 19 U.S.C. 1581(a) imposes no "border" restriction on customs officers. That section authorizes them to "go on board of any vessel or vehicle at any place in the United States or within the customs waters[4] * * * and examine the

[4]"Customs waters" are those waters up to 12 miles offshore. See 19 U.S.C. 1401(j).

manifest and other documents and papers and examine, inspect, and search the vessel or vehicle * * *." To be sure, reference to this statute does not end the inquiry, for "[i]t is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973). Thus, the inquiry is whether the Fourth Amendment requires a reasonable belief that a vessel has crossed the border before a limited investigatory stop and boarding may take place.

Petitioners' contention that there is such a requirement in the Fourth Amendment confuses the doctrine allowing plenary searches at the border upon a reasonable belief that the border has been crossed with the doctrine that allows limited investigatory stops on reasonable suspicion of illegal activity. Customs officers may conduct a full search at the functional equivalent of the border, without any reasonable suspicion, much less probable cause, of illegal activity. See *United States* v. *Ramsey*, 431 U.S. 606, 616-619 (1977); *Carroll* v. *United States*, 267 U.S. 132, 153-154 (1925); *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 376 (1971). Had there been reasonable grounds to believe that petitioners' vessel had crossed the border, the customs agents could thus have conducted a plenary search of the boat. *United States* v. *Tilton*, 534 F.2d 1363, 1365 (9th Cir. 1976); *United States* v. *Hill*, 430 F.2d 129 (5th Cir. 1970); *United States* v. *Brennan*, 538 F.2d 711 (5th Cir. 1976), cert. denied, 429 U.S. 1092 (1977). While there was evidence to support a reasonable belief that a border crossing had occurred here (the formation of salt crystals typical of an extended ocean voyage and the petitioners' apparently brand new sweatshirts proclaiming "BIMINI" across the chest), the court below did not rely on that point to justify the search (Pet. App. 10-12).

But the mere fact that there may be insufficient evidence of a border crossing does not mean that law enforcement officers are restricted from taking any action at all. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), this Court held that government agents may stop cars, question their occupants briefly, and ask for documents if they have reasonable suspicion, drawn from "specific articulable facts [and] rational inferences from those facts," that the cars contain illegal aliens. *Id.* at 884. If, during the course of these investigatory stops, the agents find probable cause to believe a crime is being committed, they may search further. *Id.* at 882.

The court below simply applied the principles of *Brignoni-Ponce* to the present facts.[5] As noted, the customs agents had a reasonable suspicion, drawn from specific articulable facts and rational inference from those facts (see Pet. App. 8, 12-13), that petitioners were carrying contraband. Petitioners do not contest that conclusion. The customs agents requested identification and registration papers; petitioners produced only one identification and an unsigned registration for the boat (Pet. App. 9). One officer then stepped aboard the docked vessel to investigate further and, as soon as he did so, he smelled marijuana (*ibid.*). Only at this point did he conduct a search. Both the majority and the concurring

[5]The majority noted that "[t]here are * * * problems with justifying *all* the officers' conduct on *Brignoni-Ponce* grounds" (Pet. App. 12; emphasis added). This is true insofar as the search itself could not be justified merely on reasonable suspicion; under *Brignoni-Ponce*, that suspicion can justify only the stop. But the search here was justified on the basis of probable cause arising after the stop (Pet. App. 31, 34)—a result that *Brignoni-Ponce* explicitly countenanced (see 422 U.S. at 882). Thus, all the officers' conduct—the stop and then the search based on probable cause—is indeed "justif[ied] * * * on *Brignoni-Ponce* grounds."

judge below held that the smell of marijuana supplied probable cause for the search (Pet. App. 31, 34), and petitioners do not contest that conclusion either. Thus, regardless of the substantiality of petitioners' attack on the majority's constitutional exegesis, the result it reached is fully within the standards set by this Court in *Brignoni-Ponce, supra.*

Petitioners' contention (Pet. 12-13) that the decision below conflicts with *Almeida-Sanchez* v. *United States, supra*, is therefore untenable. In *Almeida-Sanchez*, the defendant's car was "thoroughly searched" (413 U.S. at 267) with "no probable cause of any kind * * *—not even * * * 'reasonable suspicion' * * *" (*id.* at 268). Here, petitioners were subjected only to an investigatory stop of limited scope, and that only on reasonable suspicion; no search took place until after probable cause was established. The customs officers' actions thus did not violate the principles of *Almeida-Sanchez*; rather they comported with *Brignoni-Ponce*.

Petitioners err in contending (Pet. 11) that the majority below created a "nautical exception" to the Fourth Amendment.[6] Quite the opposite is true, for the majority adhered to "the fourth amendment principles applicable" in the context of searches at sea. Pet. App. 13; see also Pet. App. 14, 22, 23, 29-31. What the majority did do was

[6]Nor did Judge Rubin accuse the majority of having done so. He did state that "Section 1581 does not create a sort of nautical exception to the fourth amendment" (Pet. App. 38), but this was by way of taking issue with the majority's statement that Section 1581 has been upheld "at least as to some searches on water under fourth amendment analysis because of the unique character and history of law enforcement on our country's seaways" (Pet. App. 9). But, as the majority itself stated immediately thereafter, this analysis is not without its problems, and the majority did not rely on it for its conclusion here (see Pet. App. 31).

to "resist the urge to impose uncritically on boat searches the set of standards governing auto searches on our internal highways" (Pet. App. 22). This is no more than a recognition of the truism that what is reasonable under the Fourth Amendment may vary from one situation to another. See, *e.g.*, *Preston* v. *United States*, 376 U.S. 364, 366-367 (1964); *Cooper* v. *California*, 386 U.S. 58, 59 (1967); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977).

Nor is there merit to petitioners' argument that the court below "returns Fourth Amendment jurisprudence to the concept of property law rather than an individual's expectation of privacy" (Pet. 13). The majority below "commence[d] by sounding the varying degrees of privacy one may reasonably expect aboard vessels" (Pet. App. 22), noting that "[u]nder *Katz* v. *United States*, 389 U.S. 347 * * * (1967), one's reasonable expectation of privacy is the touchstone of fourth amendment analysis" (Pet. App. 22 n.14). Only after concluding that, in these circumstances, the privacy expected in the open cockpit of a 25-foot pleasure craft after petitioners had left it would be "minimal" (Pet. App. 31), did the court uphold the brief detention of petitioners.

Likewise, petitioners' reliance (Pet. 9, 14) on *Dunaway* v. *New York*, No. 78-5066 (June 5, 1979), is misplaced, because there was in this case neither search nor arrest—in fact, nothing more than a limited detention—until after probable cause was established.

Finally, petitioners are not aided by *United States* v. *Ramsey*, *supra*, or *United States* v. *Tilton*, *supra*, in their argument (Pet. 15-16) that customs officers may not conduct a limited investigatory detention unless they find "some nexus to the border" (Pet. 15). A "nexus to the

border" is a prerequisite only to a search that is premised, not on probable cause or consent, but on "the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country" (*United States* v. *Ramsey*, *supra*, 431 U.S. at 616)—in short, a "border search." Because the search here was founded on probable cause, the question whether it might also have qualified as a border search in the absence of probable cause need not be reached, and the court of appeals declined to rest its decision on that ground (Pet. App. 10-12; see Pet. App. 35-36 (Rubin, J., concurring)). *United States* v. *Tilton*, *supra*, also involved the question whether the search, conducted without probable cause (534 F. 2d at 1364), could be justified as a border search, and thus is of no help to petitioners here.

CONCLUSION

On the magistrate question, disposition of the petition for a writ of certiorari should be deferred pending the decision in *United States* v. *Raddatz*, cert. granted, No. 79-8 (Oct. 1, 1979). In all other respects the petition should be denied.

Respectfully submitted.

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